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OCTOBER TERM, 1990

DANIEL L. MEDLOCK, *et al.*,
Petitioners,
v.
JAMES C. PLEDGER, Commissioner of Revenue, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF *AMICI CURIAE* CITIES OF LOS ANGELES, CALIFORNIA AND DUBUQUE, IOWA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The City of Los Angeles, California, and the City of Dubuque, Iowa, each franchise and regulate cable television systems in their respective jurisdictions. They do so pursuant to the Cable Communications Policy Act of 1984 ("Cable Act"), codified at 47 U.S.C. §§ 521-22, 531-33, 541-47, 551-59, which "preserved the critical role of municipal governments in the franchise process." H.R. Rep. No. 934, 98th Cong., 2d Sess. at 19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4656.

The City of Dubuque has an additional interest in this case since the State of Iowa has a generally applicable tax similar to the Arkansas gross receipts tax at issue here. The Iowa tax is applied to cable television service,

but not to newspapers. Iowa Code §§ 422.43 & 422.45.9 (1989). The State of Iowa provides as well for a local sales and service tax, which is imposed on cable television service in the City of Dubuque. Iowa Code § 422B.8 (1989).

The City of Los Angeles has a special interest in this case since it was the petitioner in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), which concerned a First Amendment challenge to the City's cable franchising requirements. The Court remanded the case for a fuller development of the disputed factual issues, holding that "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Id.* at 495. The case is now awaiting entry of final judgment in the District Court. *Preferred Communications, Inc. v. City of Los Angeles*, No. 83-5846 (C.D. Cal. filed Sept. 17, 1983).

Contrary to Petitioners' suggestion that this case provides an opportunity for the Court to decide the issues left open in *Preferred* (Pets. Br. at 23), *amici* believe the case does not present the Court with the occasion to determine the First Amendment standard to be applied to the franchising and regulation of cable television systems. The record below addresses only the far more discrete issue of state taxation of cable television providers, not the scope of or interests served by cable regulation as envisioned by Congress in the Cable Act. As a result, the record furnishes an inadequate factual predicate for the Court to consider in any meaningful fashion the "competing societal interests" that justify cable franchising and regulation. *Amici* therefore urge the Court to address only the taxation issues presented in this case, and to await a fully developed factual record on the franchising and regulatory aspects of cable before resolving additional issues raised by the First Amendment's application to cable television franchising.

SUMMARY OF ARGUMENT

The Court's holding in *Preferred*, 476 U.S. at 494, that cable television "implicates First Amendment interests," cannot be transformed into a constitutional requirement that a state must tax newspapers and subscription magazines if it wishes to tax the retail sales of cable television service. The First Amendment does not require a state to give identical tax treatment to all commercial businesses that engage in activities that implicate First Amendment interests. The range of such businesses is wide indeed, ranging from books and movies to nude dancing, as well as inserts placed by a public utility in its monthly bills to consumers. Such businesses have long been subject to generally applicable taxes, and the mere fact that a commercial activity "implicates" the First Amendment does not insulate the activity from general taxation.

The Arkansas tax challenged here does not single out the press for any special or burdensome treatment, nor does it discriminate among different members of the same medium. Thus, it is free from the constitutional defects of the tax struck down in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Nor does the Arkansas tax suffer from the content-based distinctions found impermissible in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987). Indeed, when the challenged tax provision is viewed in the context of the State's sales tax scheme as a whole, it is readily apparent that the State has merely applied to cable television service a generally applicable sales tax that applies to a wide range of goods and services. Some of these goods and services implicate the First Amendment; others do not.

The First Amendment does not require the State to exempt all such businesses if it exempts one, as long as the distinction is made on nonspeech-related, content-neutral grounds. While cable television undoubtedly im-

plicates the First Amendment, it cannot seriously be suggested that cable cannot be distinguished from newspapers and subscription magazines.

In fact, cable is readily distinguished from newspapers and magazines on a variety of nonspeech-related, content-neutral bases. The Arkansas legislature is not alone in perceiving these distinctions. Congress also recognized that cable television is distinctly different from the print media, as well as broadcasting, when it enacted the Cable Act of 1984, and established a comprehensive regulatory framework for cable television.

Because cable may be distinguished from newspapers and magazines on a variety of content-neutral, nonspeech-related grounds, the tax at issue here does not violate the First Amendment. Moreover the Court can and should reach that conclusion without resolving the constitutional issues left open in *Preferred*. *Amici* therefore urge the Court to address only the specific taxation issues presented in this case, and await a fully developed factual record on the franchising and regulatory aspects of cable television before addressing the First Amendment's application to cable franchising and regulation.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THE STATE TO ACCORD IDENTICAL TAX TREATMENT TO ALL COMMERCIAL BUSINESSES SIMPLY BECAUSE THEIR ACTIVITIES MAY IMPLICATE FIRST AMENDMENT INTERESTS.

A. This Case Does Not Present A Question of Discriminatory Tax Treatment Among Like Businesses.

This case presents the question of whether the First Amendment prohibits different tax treatment of different types of commercial businesses simply because some aspect of the businesses may implicate the First Amendment. *Amici* submit that the First Amendment does not prohibit such treatment.

Unlike *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commisioner of Revenue*, 460 U.S. 575 (1983), on which Petitioners rely, the Arkansas tax at issue here does not single out the press. Nor does the tax distinguish between different publishers in the print medium. In *Arkansas Writers' Project*, a case involving content-based differential tax treatment among magazines, the Court found it unnecessary to reach the question of "the differential treatment of newspapers and magazines," and declined to decide "whether a distinction between different types of periodicals" would "invalidat[e] the sales tax, as applied to the press." 481 U.S. at 233.

This case falls a step beyond the question left undecided in *Arkansas Writers' Project*. Here the nonspeech-related differences between cable, satellite services, broadcasting, and periodicals are far more marked than the differences between newspapers and periodicals, let alone the inherently content-based distinctions among different types of periodicals found in the *Arkansas Writers' Project* tax.

This case is also unlike the tax struck down in *Minnesota Star*, which was a non-generic tax directed specifically toward newspapers, and which singled out a select group of newspapers based on size. In contrast, the Arkansas tax at issue here is a generally applicable "ordinary form[] of taxation." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). *Cf. Jimmy Swaggart Ministries v. Board of Equalization*, —— U.S. ——, 110 S. Ct. 688, 694-95 (1990) (citing *Minneapolis Star* and *Arkansas Writers' Project*). Newspapers and subscription magazines are exempted, but the tax otherwise applies generally to a broad and disparate range of sales of goods and services, irrespective of whether the activities of the commercial businesses being taxed might somehow implicate First Amendment interests.

Thus, the Arkansas tax is not imposed only on cable television and satellite services. It applies generally to a wide variety of sales of goods and services, some of which implicate speech-related activities and some of which do not. For example, the tax is imposed on sales of books, over-the-counter magazines, television sets, radios, video-cassette recorders, movie video tapes, records, audio tapes, movie theater tickets, tickets to live entertainment events, photography services, printing services, telephone service, gas service, and electric service. J.A. 122-23, 175-78. *See also* Ark. Stat. Ann. § 26-52-301 (1987 & Supp. 1989).

Consequently, this case presents the question of whether the First Amendment requires a state to give identical tax treatment to *all* commercial businesses that engage in *any* activity that might "implicate First Amendment interests." 476 U.S. at 494. The breadth of activity engaged in by commercial businesses that "implicate First Amendment interests" is wide indeed, ranging from nude dancing to books, movies, and even inserts placed by a public utility in its monthly bills to consumers. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Butler v. Michigan*, 352 U.S. 380 (1957); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). These businesses have long been subject to generally applicable taxes, and *amici* submit that the mere fact that the commercial activity engaged in implicates First Amendment interests does not insulate such businesses from taxes of general applicability. Rather, where, as here, the tax distinctions drawn among commercial enterprises are based on content-neutral, nonspeech-related distinctions among the businesses in which they engage, such distinctions do not give rise to a First Amendment violation.

This conclusion is confirmed by the Court's reasoning in upholding regulations, taxes, and other laws of general applicability when applied to such traditional First

Amendment-related businesses as booksellers, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698 (1986), and retail sales of religious materials, *Jimmy Swaggart*, 110 S. Ct. 688. *Amici* submit that the Court's reasoning in upholding the statutes at issue in *Jimmy Swaggart* and *Arcara* applies with equal force to the generally applicable tax at issue here.

Cable television system operators may not "claim special protection from governmental [taxation] of general applicability simply by virtue of their First Amendment protected activities." *Arcara*, 478 U.S. at 705. By definition, every tax "imposes some conceivable burden on First Amendment activities.' *Id.* at 706. Thus, while it may be true that a cable service provider paying the tax "has less money to spend" on the business than without the tax, that fact should not "give[] rise to a valid First Amendment claim." *Id.*

Indeed, unless the Court is prepared to suggest that the Free Speech Clause affords greater insulation from generally applicable taxes than the Free Expression Clause, the Court's unanimous decision in *Jimmy Swaggart* all but compels the conclusion that the generally applicable sales tax applied to cable and satellite services here is consistent with the First Amendment. In *Jimmy Swaggart*, the Court upheld the application of California's general tax on sales of tangible personal property to sales of religious materials, including books.[1] Like the California tax upheld in *Jimmy Swaggart*, the Arkansas tax at issue here "is not a tax on the right to disseminate . . . information, ideas, or beliefs *per se*; it is a tax on the privilege of making retail sales." 110 S. Ct. at 695-96. Those retail sales here include, but are hardly limited to, sales of cable

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[1] Ark. Stat. Ann. § 26-52-301(1), which is a subparagraph of the statute containing the tax provision challenged here, Ark. Stat. Ann. § 26-52-301(3)(D)(i), applies to sales of "tangible personal property," including retail sales of books. J.A. 122, 175.

television service. Consequently, because of its general applicability, the Arkansas tax presents "no danger that [a cable operator's] activity is being singled out for special and burdensome treatment." *Id.* at 696.

B. Compelling State Interest Analysis is Necessary Only Where, Unlike Here, A State Tax Singles Out the Press or Discriminates Among Members of the Same Medium That Are Indistinguishable On a Content-Neutral Basis.

Minneapolis Star holds that singling out the press or a specific class of publishers for differential tax treatment is presumptively unconstitutional. Implicit in this holding is the principle that if a tax does not single out the press or discriminate among members of the same press-related business, differential taxation may be justified without need for a judicial balancing of the state's interests against First Amendment interests. It is only where a tax differentiates among businesses that cannot be distinguished on a content-neutral, nonspeech-related basis that differential taxation must be justified by "a counterbalancing [state] interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585.

A careful examination of the Court's opinion in *Minneapolis Star* confirms this conclusion. In Part III, the Court addressed the question of whether Minnesota could single out the press for a "special tax that applies only to certain publications protected by the First Amendment." *Id.* at 581. Only after determining that the tax singled out the press did the Court hold that a special burden on the press could not stand "unless justified by some special characteristic of the press . . ." *Id.* at 585.

Differential tax treatment among members of the same medium, *i.e.*, among newspapers, is dealt with in Part V of the Court's opinion in *Minneapolis Star*. Although Part V does not explicitly refer to a two-step analysis, the

Court made the self-evident assumption that newspapers are homogeneous from a First Amendment perspective. The Court concluded that differential tax treatment of newspapers based on size was inherently suspect, and thus subject to a compelling interest justification.[2] A "tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S. at 592-93. Accordingly, only after the Court concluded that the tax at issue singled out some newspapers from others was there a need "to balance the burden implicit in singling out the press against the interest asserted by the State." *Id.* at n.7.

That *Minneapolis Star* establishes a two-part test is made quite clear by the structure of the Court's opinion in *Arkansas Writers' Project.* In Part III(A) the Court concluded that the Arkansas tax "targets a small group within the press." *Arkansas Writers' Project*, 481 U.S. at 229. The Court also found that the distinction drawn by the statute was content-based. *Id.* at 229-30. Only then did the Court, in Part III(B) of its opinion, consider the State's "heavy burden in attempting to defend its content-based approach to taxation . . . ." *Id.* at 231. The Court then applied the same compelling interest standard to discrimination among members of the same medium as it applied to the singling out of the press in Part III of *Minneapolis Star. Id.* at 231-32.

Thus, under *Minneapolis Star* and *Arkansas Writers' Project*, the question of whether a tax can be justified by a "compelling state interest," separate and apart from the government's interest in raising revenue, is reached

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[2] The Court found:

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

460 U.S. at 591-92.

only *after*, and only *if*, the tax at issue singles out the press, or a narrow segment thereof, or subjects members of the same medium to content-based discriminatory tax treatment.[3] The Arkansas tax at issue here does neither.

C. Petitioners' Analysis Improperly By-Passes the Threshold Test of Whether the Tax At Issue Singles Out the Press or Discriminates Among Taxable Commercial Businesses Based on Content.

Petitioners err in telescoping the two-part test laid down in *Minneapolis Star*.[4] Thus, Petitioners leap from the Court's narrow holding in *City of Los Angeles v. Preferred Communications, Inc.*, that cable activities "implicate First Amendment interests," 476 U.S. 488, 494 (1986), to the conclusion "that cable television services should be equated and compared" to the traditional print media. Pets. Br. at 27.

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[3] Any doubt that *Minneapolis Star* and *Arkansas Writers' Project* must be read in this manner is dispelled by the Court's decision in *Jimmy Swaggart*. There is no suggestion in *Jimmy Swaggart* that the State had to articulate a compelling interest independent of its revenue interest in applying its tax provisions to books and religious materials. 110 S. Ct. at 697. Similarly, in *Arcara*, the Court did not require that application of the statute to a bookstore had to be justified by a compelling interest based on "some special characteristic" of bookstores or independent of the general interest served by the statute when applied in other, non-First Amendment-related contexts. *See* 478 U.S. at 705-07. Because the tax at issue in this case neither singles out the press nor subjects members of the same business to differential treatment, it too may be justified by the general governmental interest underlying taxes: raising revenue.

[4] Petitioners assert:

> [O]nce the challenging taxpayer has evidentiarily established the existence of this differential taxation among or between members of the press (*Arkansas Writers'*, 107 S. Ct. at 1729), then the burden of proof shifts from the taxpayer to the taxing authority to establish a 'compelling' governmental interest that is being served by this differential taxation.

Pets. Br. at 24 (footnotes omitted).

Petitioners' logic is flawed. Such an approach would result in compelling the State to afford identical tax treatment to *all* commercial businesses that happen to engage in any activity that "implicates" the First Amendment. If Arkansas exempts one class of business whose activities "implicate" the First Amendment, then it must exempt them all (or, alternatively, it must tax them all). If newspapers and subscription magazines are exempt,[5] then so must be retail sales of books, videotapes, records, cassettes, televisions, radios, videocassette recorders; photography and printing services; tickets to movies, theater, ballet, and nude dancing performances,[6] as well as communications-related public utility services like telephone.[7]

If the First Amendment were construed to require the State to extend its current narrow newspaper and subscription magazine exemption to all retail sales of goods or services that implicate the First Amendment, the certain result would be a massive erosion of the State's tax base, thereby frustrating its concededly substantial, indeed compelling, interest in raising revenue. *See Minneapolis Star*, 460 U.S. at 581. Alternatively, of course, the State could tax newspapers and subscription magazines, but it is hard indeed to believe that the First Amendment must be construed to compel such taxation.

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[5] Ark. Stat. Ann. § 26-52-401 (1987 & Supp. 1989); J.A. 118-20, 183-88.

[6] All of these sales are currently subject to the same sales tax as cable and satellite services under Ark. Stat. Ann. § 26-52-301. *See* J.A. 122-23, 175-78.

[7] Telephone service is also subject to the same sales tax as cable and satellite services. Ark. Stat. Ann. § 26-52-301(32); J.A. 177. Indeed, taking Petitioners' view to its logical conclusion, public utility services like gas and electric services, currently subject to the Arkansas sales tax (J.A. 177), would also arguably be exempt, since utilities can and do engage in activities implicating the First Amendment. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530.

In fact, this Court's decisions in *Minneapolis Star* and *Arkansas Writers' Project* do not compel such a perverse result. The Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), is instructive on this point. There the Court upheld against First Amendment challenge certain federal tax law provisions that denied tax deductions for contributions made to lobbying organizations, but permitted deductions for contributions made to veterans' organizations, even though such organizations also engaged in lobbying.

Like the tax deduction in *Regan*, the newspaper and magazine tax exemption that Petitioners seek to expand here is "a form of tax subsidy that is administered through the tax system."[8] 461 U.S. at 544. In not expanding the narrow exemption to include all commercial activities that implicate the First Amendment, Arkansas "has merely refused to pay for [those activities] out of public moneys." *Id.* at 545. A legislature has broad discretion in the field of taxation, where it possesses "the greatest freedom in classification." *Id.* at 547 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)). A tax is constitutional unless there is an indication that it "was intended to suppress any ideas or any demonstration that it has had that effect." *Id.* at 548. There can be no such showing here, for the tax no more suppresses the business activities of cable operators than it does those of the wide range of other businesses subject to the tax.

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[8] Thus, *amicus* National Cable Television Association's ("NCTA") attempt to distinguish *Regan* fails. NCTA Br. at n.10. Contrary to NCTA's suggestion, the general denial of tax deductions for lobbying activities in *Regan* was, just like the tax at issue here, "a governmental exaction" from which the complaining taxpayer was not exempt. *Id.* And just like the deduction at issue in *Regan*, the Arkansas newspaper and magazine exemption is a "simple subsidy" that does not make taxed entities like cable operators "worse off in an absolute sense" and "therefore raises less constitutional concern." *Id.*

Accordingly, the question in this case, as it was in *Minneapolis Star*, *Arkansas Writers' Project*, and *Jimmy Swaggart* is whether the tax classification singles out (or is susceptible to singling out) a constitutionally protected activity "for special and burdensome treatment." *Jimmy Swaggart*, 110 S. Ct. at 696. As we show below, it does not.

D. The Tax At Issue Is Constitutional Because It Does Not Single Out Cable, and Cable Can Be Readily Distinguished From the Print Medium On Content-Neutral, Nonspeech-Related Bases.

When viewed in the context of the entire Arkansas sales tax scheme, rather than in isolation, it is apparent that Arkansas has not singled out cable service (or satellite services, for that matter) for any special or burdensome treatment. On the contrary, the record makes very clear that the specific tax provision challenged here merely makes cable television service subject to the same, generally applicable sales tax that Arkansas applies to a wide range of retail sales of goods and services. Some of these goods and services, such as book, record, videocassette, and theater ticket sales, "implicate" the First Amendment while others do not. As a result, the tax is no more susceptible to being used as a "powerful weapon" against providers of cable service than it is against providers of public utility services or, for that matter, sellers of furniture, candy, or shoes. The tax is thus readily distinguishable from the tax struck down in *Minneapolis Star*, which was unique to the press, and thus capable of becoming a "powerful weapon" aimed at the press. *Minneapolis Star*, 460 U.S. at 585.

Moreover, the tax at issue here is also distinguishable from the tax in *Arkansas Writers' Project*, which drew content-based distinctions among different magazine publishers. 481 U.S. at 229-30. The tax here, of course,

draws no distinction whatsoever, content-based or content-neutral, among providers of cable service.

Although Petitioners and their supporting *amici* argue at length about the supposed ways in which certain activities of cable operators "implicate" the First Amendment, they do not suggest that cable television service cannot be distinguished from the newspaper and subscription magazine businesses exempted from the Arkansas tax. Pets. Br. at 26-29. Nor do they explain why cable should be singled out for favorable treatment in the form of a tax exemption when other businesses whose activities also "implicate" the First Amendment are not.

In fact, the provision of cable service is easily distinguished from newspapers and magazines on a variety of content-neutral, nonspeech-related bases. Conversely, cable shares content-neutral, nonspeech-related attributes with many businesses that, like cable, are subject to the Arkansas sales tax.

For example, unlike newspapers and magazines, and like the public utility services subject to the tax, cable systems have the distinctive trait of providing service through a comprehensive distribution network that crosses public streets and rights-of-way. The distribution network is installed on utility poles or buried underground in conduit in public rights-of-way.[9] J.A. 79.

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[9] *Amici* Competitive Cable Association and the Media Institute ("CCA") assert "there is doubt as to the extent of the property interest held by local governments in [public] rights-of-way [occupied by cable systems], at least in some circumstances." CCA Br. at 12. However, every court that has addressed the question, including the one cited by CCA, has held that municipalities "have the right to hold in trust the public's property interests in the rights of way for cable television." *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1567 (N.D. Cal. 1988) (cited in CCA Br. at 12). *Accord Preferred Communications, Inc. v. City of Los Angeles*, No. 83-5846, Mem. Ord. at 11-12 (C.D. Cal. Aug. 24,

Unlike newspapers and magazines, and like the sale or rental of books, video tapes, records, cassette tapes, the sale of television sets and videocassette recorders, and the sale of ballet, theater and movie tickets that are subject to the tax, cable operators serve primarily as distributors to the public of information generated or performed by others. *See* Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339-43; J.A. 77. Also unlike newspapers and magazines (and broadcasters, for that matter), which receive either all or the bulk of their revenues from advertising rather than retail customers, and like *all* other businesses subject to the Arkansas sales tax, cable television operators receive the bulk of their revenues from retail sales to the public.[10]

The Arkansas legislature is far from alone in perceiving that cable television is distinctly different from newspapers and subscription magazines. Congress has recognized the distinction between cable and the print medium (and broadcasting as well) in enacting the comprehensive regulatory framework for cable television that is embodied in the Cable Act. For example, the Act au-

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1990); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63 & 972-74 (N.D. Cal. 1987), *further proceedings*, 679 F. Supp. 977, 979 (N.D. Cal. 1988); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 594 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3rd Cir. 1988). Thus, even if the Court were to find the sales tax at issue here unconstitutional, it should make clear that its decision is in no way intended to cast doubt on the constitutionality of cable franchise fees, which serve the independent and cable-specific governmental interest of providing compensation for a cable system's inherent and comprehensive use of public property. *E.g., Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal. 2d 272, 282 P.2d 36, 43 (1955) (franchise fee is "not a tax" but "compensation for the privilege of using the streets and other public property within the territory covered by the franchise").

[10] On its face, the tax at issue here does not apply to any advertising revenue a cable service provider might receive, so cable operators are treated no differently than newspapers, magazines, or broadcasters in this respect.

thorizes "a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." 47 U.S.C. § 543(b)(1). In implementing this provision, the Federal Communications Commission ("FCC") recognized the dissimilarity between cable television and the print medium in concluding that neither newspapers nor magazines (nor, for that matter, the print medium in general) compete in the same market as cable. The FCC defined "effective competition" only in terms of the number of over-the-air television broadcast signals available to cable subscribers.[11] The FCC has consequently never considered either newspapers or magazines, or the print medium generally, to be "effective competition" to cable. Thus, Petitioners' efforts to equate cable television with the print medium is also at odds with objective, marketplace reality.

Moreover, Congress expressly recognized in the Cable Act that cable television operators would be subject to generally applicable state taxes such as the Arkansas tax challenged here. In Section 622 of the Cable Act, 47 U.S.C. § 542, Congress specifically provided that, in addition to the franchise fees that a franchising authority may impose, cable systems could be subject to any tax of general applicability, *viz.*:

> any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers).

47 U.S.C. § 542(g)(2)(A).

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[11] *See Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 50 Fed. Reg. 18,637 (FCC 1985), *aff'd in part, rev'd in part sub nom. American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), *on remand*, Second Report and Order, 3 FCC Rcd 2617 (1988). *See also* 47 C.F.R. § 76.33 (1989).

Cable television companies and the cable systems they operate possess several other unique attributes that distinguish them not only from the printed press, but from most other businesses selling goods or services to the public. *Amici* believe that these attributes justify the scope of local regulation of cable systems established by Congress in the Cable Act. But on the record before it, the Court cannot and should not reach those issues here.[12] For present purposes, it is sufficient to recognize that

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[12] As the Court held in *Preferred*, an adequate factual record dealing specifically with cable franchising and regulation is necessary to address these issues. *Preferred*, 476 U.S. at 494. The complexity of the issues is evidenced by lower court opinions that have addressed them, with divergent results. *Compare Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990) (after *Preferred*, full contours of cable operator's first amendment right remain unshaped); *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 839 (1990) (*O'Brien* standard applied; local origination programming requirement upheld); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) (natural monopoly characteristics of cable sufficient under First Amendment to award exclusive franchise); *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (natural monopoly characteristics may justify entry regulation under First Amendment); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (government can reasoably anticipate "media scarcity" in cable and has authority to ensure optimum use of medium); *Erie Telecommunications, Inc. v. City of Erie*, 569 F. Supp. 580 (franchise fee and access requirements upheld under *O'Brien*); *Carlson v. Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) (revocation of cable franchise subject to rational relation test and upheld under *O'Brien*); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (mandatory cable access requirements upheld under analogy to broadcasting medium); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982) (content-neutral selection of single cable franchisee based on competitive bidding consistent with First Amendment) *with Pacific*

cable system operators are not newspaper or magazine publishers, and they may be readily distinguished from such print publishers on a variety of content-neutral, nonspeech-related bases.

Amici submit that the existence of such content-neutral, nonspeech-related distinguishing factors is sufficient to take the tax at issue here outside the scope of the suspect taxes in *Minneapolis Star* and *Arkansas Writers' Project.* Any other result here would extend the rationale of those cases to taxation of any business engaging in any activity that "implicates the First Amendment," thereby undermining the ability of the State to implement meaningful forms of tax classification and to raise revenue. Accordingly, the Arkansas statutes at issue here should be found constitutional.

West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) (city's single franchise policy unconstitutional); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (city's single franchise policy and access requirements unconstitutional by analogy to newspapers); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986) (exclusive cable franchising unconstitutional under *O'Brien* because it did not further city's articulated interest).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to uphold the constitutionality of the Arkansas tax statutes at issue by affirming in part the decision of the Supreme Court of Arkansas.

Respectfully submitted,

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